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No. 106

IN THE

# Supreme Court of the United States

OCTOBER TERM 1970

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ALABAMA POWER COMPANY, et al.,

*Appellants,*

v.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION,

*Appellees.*

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*On Appeal From The United States District Court For The District Of Columbia*

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## BRIEF ON THE MERITS OF AMICUS CURIAE THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

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## BRIEF ON THE MERITS OF AMICUS CURIAE THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

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## OPINION BELOW

The opinion of the United States District Court for the District of Columbia (App. 213-219) is not yet officially reported. The initial and final reports of the Interstate Commerce Commission are reported at 332 ICC 590 and 332 ICC 714 (App. 284-397).

## JURISDICTION

The decision of the three judge District Court dismissing for lack of jurisdiction the complaint of shippers seeking judicial review of the Reports and Orders of the Interstate Commerce Commission was entered on December 4, 1970. After the filing of the Jurisdictional Statement, a Brief of this amicus curiae, the National Industrial Traffic League, in support of the jurisdictional statement and a motion to affirm from the railroad intervenors, this Court noted probable jurisdiction on May 18, 1970 and ordered the case consolidated with No. 78 ., (October 1969 term No. 1083) *Atlantic City Electric Co. v. United States.* The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b). *City of Chicago v. United States*, 396 U.S. 162, 24 L.Ed.2d 340 (1969); *American Trucking Association, Inc. v. Atchison, T. & S.F. Ry.*, 387 U.S. 398 (1967); *United States v. Drum*, 368 U.S. 370 (1962); *Frozen Food Express, Inc. v. United States*, 351 U.S. 40 (1956).

## QUESTION PRESENTED

As stated by the appellants, the question presented is: May shippers, both individually and as a class, be denied judicial review of Commission orders, entered after hearing and investigation, insofar as they authorize across-the-board increases in the level of railroad freight rates and charges, and modify outstanding rate orders and grant Fourth Section relief to the extent necessary to permit the increases to become effective?

## STATUTES INVOLVED

Sections 551, 702 and 704 of Title 5, United States Code, The Administrative Procedure Act; Section 1336 of Title 28, United States Code; and Sections 13, 15(1), 15(7) and 15a(2) of the Interstate Commerce Act, as amended, are set forth in Appendix D to the appellants' Jurisdictional Statement.

## STATEMENT OF THE CASE

The proceeding in the court below was instituted by several groups of shippers to enjoin, annul and set aside certain rate increase orders of the Interstate Commerce Commission entered November 26, 1968 and January 9, 1969 in Ex Parte No. 259, *Increased Freight Rates, 1968*, 332 ICC 714. These orders permit the railroads of the United States to effect a general increase in their freight rates and charges which averaged about 5 percent, but differed as between commodities between 3 percent and 10 percent, for a total increase of approximately $450 million per annum.

The National Industrial Traffic League, *amicus curiae* herein, was a protestant and participated actively throughout the proceedings before the Interstate Commerce Commission. It presented evidence through two separate verified statements of a Transportation Economist. However, its participation related only to the general issues as to the overall revenue need and the justness and reasonableness of the overall increase. Its active participation was basically in the sub-number 2 proceeding designated by the Commission as "Railroad Cost and Revenue Needs." The issues in Sub-numbers 3 - 11 dealt with the increases as they applied on particular commodities. As a national association of shippers, chambers of commerce and boards of trade located throughout the country and using all modes of transportation, including railroads, and with interests relating to all commodities, the League did not participate in the sub-numbered proceedings dealing with specific commodity application of the general increase in issue

The three-judge statutory District Court by a two-to-one vote (Circuit Judge J. Skelly Wright, dissenting) dismissed the complaint on the ground that "it lacks jurisdiction to review the questioned Commission orders," citing the 1935 decision in *Algoma Coal and Coke Co. v. United States*, 11 F. Supp. 487 (E.D. Va.), as controlling. (App. 215.)

## SUMMARY OF ARGUMENT

Judicial review of general rate increases is not expressly precluded. Review of agency decisions are generally subject to judicial review, particularly where they have such a broad and immediate effect as an average five percent increase in a $10 billion rate structure. The decision of the Court below denying judicial review is in conflict with the broad review generally permitted of agency decisions including those of the Interstate Commerce Commission. Judicial review should be available both as to the overall amount of increase as well as to the general manner by which it is to be apportuned to different traffic.

## ARGUMENT

### I.

### Judicial Review of the Commission's Action Is Not Precluded

There is no express statutory exclusion of review from a decision and order of the Interstate Commerce Commission including the decision and order in this proceeding, authorizing and approving a general rate increase for railroads. Nothing to that effect was cited by the Court below or by the railroads in urging a lack of jurisdiction.

The statutes provide for judicial review. Jurisdiction is conferred on the District Courts to set aside, annul, enjoin, etc., orders of the Interstate Commerce Commission, specifically Section 1336 of Title 28 of the United States Code. 28 USCA §1336. The Interstate Commerce Act in Section 17(9) specifically contemplates "a suit to enforce, enjoin, suspend or set aside" a decision, order, or requirement, in whole or in part, of the Commission and further contemplates that such a suit may be brought in a court of the United States under applicable provisions of law. 49 USCA §17(9). Section 17 of the Interstate Commerce Act in all of its paragraphs deals generally with the questions of Commission procedure, the delegation of duties, separations into divisions, the handling of proceedings, including the submission of written reports

with respect to matters involving the taking of testimony of public hearings, rehearings, reargurnents and reconsiderations, stays pending disposition of applications for reconsideration, etc., USCA §17(9). These general procedures including the provision for court appeal set forth in Section 17(9) follow in sequence the provisions of Section 15 setting forth the Commission's investigation procedures. Section 17 follows and applies equally to the alternative proceedings before the Commission instituted as investigations, under Section 15 of the Act, the procedure in this case.[1]

The Administrative Procedure Act specifically provides that agency action, including an agency such as the Interstate Commerce Commission, is subject to court review, 5 USCA §§ 702, 704. The Administrative Procedure Act has been described as containing "generous review provisions" which "must be given a 'hospitable' interpretation" so that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 139, 140. Cf. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150; *Barlow v. Collins*, 397 U.S. 159.

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[1] The Commission's initial report, 332 I.C.C. 590, 595 (App. 256-7), indicates that the investigation was being partially conducted under the provisions of Section 13 of the Act. 49 USCA § 13(3).

## II.

### The Decision of the Court Below Denying Judicial Review Is in Conflict with Review Generally Granted Decisions of Administrative Agencies Including Those of the Interstate Commerce Commission

Only persuasive reasons should prevent judicial review. This Court discussing review of I.C.C. decisions, has recently stated in *City of Chicago v. United States*, 396 U.S. 162, 24 L.Ed. 340, 343 that:

> ". . . We start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose."

A noted author has expressed the same concept with the proposition that "in our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination on its validity." Jaffe, "Judicial Control of Administrative Action." Little, Brown & Company, Boston, 1965, page 336.

This Court recently re-emphasized these principles strongly favoring judicial review in *Association of Data Processing Service Organization, Inc. v. Camp*, 397 U.S. 150, 25 L.Ed. 2d 184; and *Barlow v. Collins*, 397 U.S. 159, 25 L.Ed.2d 192.

The decision of the Court below is in conflict with cases, many from the same circuit, reviewing closely analagous decisions from other regulatory agencies. Parties before other agencies have been able to obtain judicial review of decisions from their respective agencies dealing with matters quite comparable to the general rail increase which was the subject matter of the complaint below. General rate increases by power companies or natural gas companies regulated by the Federal Power Commission have been subjected to judicial review. *Lynchburg Gas Company v. FPC*, 336 F. 2d 942 (D.C. Cir.,

1964); *City of Pittsburgh v. FPC*, 237 F. 2d 741 (1956). General rate investigation decisions of the Federal Communication Commission are reviewable. *Wilson & Co., Inc. v. United States*, 335 F. 2d 788 (7th Cir., 1964) *cert. denied* 380 U.S. 951; *American Trucking Association, Inc. v. FCC*, 377 F. 2d 121 (D.C. Cir., 1966) *cert. denied*, 386 U.S. 943. Civil Aeronautics Board decisions involving general rate investigations are subject to judicial review. *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466, 476 (5th Cir., 1967) *cert. denied*, 390 U.S. 920; *Moss v. CAB*, ___ F.2d ___ (No. 23,627 decided July 9, 1970, U.S. App. D.C.). Federal Maritime decisions dealing with general rate increases are subject to judicial review. *Government of Guam v. FMC*, 329 F.2d 251 (D.C. Cir., 1964); *Puerto Rico v. FMC*, 288 F.2d 348 (D.C. Cir. 1961).

The decision of the Court below conflicts with decisions providing judicial review of other I.C.C. decisions. Commission decisions entered in rate investigation proceedings have consistently been subjected to judicial review. *Central and Southern Motor Freight Tariff Assn. Inc., v. United States*, ___ F.Supp.___, 1969 Federal Carriers Cases No. 82, 107 (N.D. Ga., 1969), reviewing Investigation and Suspension Docket No. M-22165, *Delivery Charges on LTL Shipments To Points in Florida*, 332 I.C.C. 892 (1968); *Ryder Truck Lines, Inc., v. United States*, 308 F.Supp. 341, 1969 Federal Carriers Cases No. 81, 161 (M.D. Fla. 1969), reviewing I. & S. Docket M-21914, *Pickup Charges, Ryder Truck Lines*, 335 I.C.C. 39 (1968) and Docket No. 34915, *Arbitrary Charges on Shipments From Georgia to Florida*, 335 I.C.C. 209 (1960); *Ringsby Truck Lines, Inc. v. United States*, 263 F.Supp. 552 (D. Colo., 1967), appeal dismissed as moot 389 U.S. 576 (1968), reviewing Docket 34662, *Increased Class & Commodity Rates, Transcontinental*, 326 I.C.C. 397 (1966); *Accelerated Transport-Pony Express, Inc., v. United States*, 227 F.Supp. 815 (D. Vt., 1964) aff'd, *per curiam*, 379 U.S. 4 (1964), reviewing Docket 33652, *General Increase - Middle Atlantic and New England Territories*, 319 I.C.C. 168 (1963); *Saginaw Transfer Co. v. United States*, 275 F.Supp. 585

(E.D. Mich., 1967), reviewing Docket No. 33978, *Chemicals In Aggregate Shipments, Midland, Michigan to the East*, 326 I.C.C. 657 (1965).

Declaratory orders of the Commission are reviewable. *Keller Industries, Inc. v. United States*, 304 F.S. 852 (N.D. Fla. 1969); *Pennsylvania RR. v. United States*, 363 U.S. 205 (1963).

The decision below was inconsistent with the judicial review granted in *Boston and Maine Railroad v. United States*, 162 F.Supp. 289, 292, n. 4 (D. Mass., 1958), appeal dismissed, 358 U.S. 68, wherein the court had provided judicial review and remanded a decision of the Commission finding that per diem charges were not in excess of reasonable compensation during the period which they had been in effect and that "the latter charge is not in excess of reasonable compensation for present use."

Ex Parte docket investigations, including general rule-making proceedings, are reviewable. *Northern Freight Lines v. United States*, 304 F.Supp. 536 (N.D. Ga., 1969) reviewing Ex Parte No. 242, *Express Company Terminal Areas*, 332 I.C.C. 91 (1967); *American Trucking Assn. v. Atchison T.&S.F. Ry.*, 387 U.S. 397 (1967) reversing 244 F.Supp. 955 (N.D. Ill., 1966) reviewing Ex Parte 230; *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders*, 322 I.C.C. 301 (1964); Cf *Frozen Food Express v. United States*, 351 U.S. 40 (1956).

The denial of judicial review below is contrary to this Court's very recent decision in *City of Chicago v. United States*, 24 L.Ed.2d 340 (1969), granting judicial review of an ICC order terminating an investigation of a proposed passenger train discontinuance.

## III

### The Investigation Remedy Was Exhausted: The Commission's Decision Is Ripe For Judicial Review.

The specific administrative remedy involved, i.e. a general investigation of the lawfulness of the total amount of the increase and its general manner of apportionment, has been completed. The Commission's action being attacked in the Court below was an administratively final determination. Hearings had been provided, cross-examination had been completed, briefs had been presented, oral arguments had been heard, a full written report and order had been adopted. No further action by the Commission was required, available, contemplated or possible. Other than under extraordinary rule relief, the Commission's procedures did not permit the filing of any further papers. The Commission's administrative procedures by which parties could challenge the Commission's conclusions as to the lawfulness of the overall increase had been exhausted.[1]

The Commission's report herein dealt with the merits. It should not be said that a Commission's decision that increases should not be allowed is a reviewable decision, while an answer like that here saying the increase shall be allowed is not a reviewable decision. Cf. *City of Chicago v. United States*, 24 L.Ed.2d 340, 344 (1969), where this Court said:

> A decision to investigate indicated that a substantial question exists under the statutory standards. The Commission's report therefore deals with the merits. We cannot say that an answer that discontinuance should not be allowed is agency "action,"

[1] In a Section 13 complaint proceeding challenging the specific application of a general rail increase to particular rates the Commission has stated that "whether or not the permissive order entered was justified based on the evidence of record therein is not a relevant consideration in the instant proceeding." *Koppers Co., Inc. v. Chesapeake & Ohio Ry.*, 303 ICC 383, 387 (1958).

while an answer saying the reverse is agency "inaction." The technical form of the order is irrelevant. In each case the Commission is deciding the merits.

The Commission's decision is in a justiciable form to be considered ripe for review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-9 (1967). This is not an abstract disagreement. The vital interests of the Appellants are affected. The withholding of court consideration works a severe hardship on the appellants as well as other parties to the Commission proceeding. As clearly seen by Judge Wright in his dissent, the alternative complaints are neither reasonable nor feasible, involving as they do a great multiplicity of individual rate cases separately attempting to challenge the correctness of the overall increase. Judicial review of the Commission's decision on the reasonableness of the overall increase and the lawfulness of the general manner of its apportionment should have been provided by the court below.

## IV

## Algoma Is Not Controlling

The lower court's reliance upon *Algoma Coal & Coke Co. v. United States*, 11 F. Supp. 487 (E.D. Va., 1935), is misplaced and contrary to the widely recognized right of parties to obtain judicial review of agency action. *Algoma* involved a suit by a limited number of the parties to the case before the Commission to enjoin the Commission's action in approving a general increase only insofar as it applied to the rates on their movements of coal. They did not make an overall attack upon the propriety of the Commission's conclusion or findings with respect thereto relating to the total general increase. *Algoma* incorrectly attempted to make a distinction between rates prescribed and permitted by the ICC. Subsequent cases subjected to judicial review and considered by this Court have involved carrier made rates approved by the Commission yet not prescribed by the Commission. The distinction for the purposes of judicial review was not one that had been recognized prior to

*Algoma* nor was it one that has been recognized subsequent to *Algoma*. Nor is it clear that the Court in *Algoma* actually rested its conclusion on an alleged lack of jurisdiction to grant judicial review, since it clearly went on to consider at some length the issues raised on the merits relating to: the adequacy of preliminary findings, the Commission's authority and the exercise of its administrative discretion in finding a special case under the Fourth-Section, the lack of a showing that the orders prejudicially affected the plaintiff; and the scope of administrative discretion in deciding whether or not to suspend rates.

With respect to the jurisdictional conclusion, if that was the basis of *Algoma*—a position not fully supported by the decision itself, the court in *Algoma* cited no prior cases by this Court nor any statute precluding judicial review of the Commission's decision. Its reliance upon *Birmingham Slag Co. v. United States*, 11 F.Supp. 486 (M.D. Ala., 1935) and *Pitzer Transfer Corp. v. Norfolk & Western Ry. Co.*, 11 F.Supp. 436 (D. Md. 1935), is neither clear nor properly placed. *Birmingham Slag* is a case in which an injunction seeking to restrain "certain named carrier defendants from acting in pursuance of certain orders of the ICC" and thus was an attempt to have the Court act in suspending the rates as opposed to a suit to enjoin, annul, or set aside a Commission determination. *Pitzer* was totally inapposite since it involved a suit by a shipper to enforce a Commission order determining that the rate paid was unreasonable and excessive and ordering reparation. *Algoma* is premised on the failure of the Commission to suspend the rates, "a matter within the administrative discretion of Commission, not now reviewable in the courts." 11 F.Supp. 487 at 495. This basis of the *Algoma* decision is consistent with subsequent decisions in which the courts have been held to lack jurisdiction to review a discretionary withholding by the Commission of its power to suspend. *Arrow Transportation Co. v. Southern Ry. Co.*, 372 U.S. 658 (1963), and cases cited therein.

The Court in *Algoma* emphasized that granting relief to the plaintiff therein with respect only to the coal rates in issue in that case would have created a discriminatory situation. 311 F. Supp. at 496. But this is not the situation raised in the case below where no specific application was attacked but the general increase as a whole was placed in issue.

The decision of the Court below and *Algoma* upon which it relies have both failed to make the analysis required by the Administrative Procedure Act, 5 U.S.C. § 701(a), as to whether the statutes precluded judicial review or the agency action was committed to agency discretion by law. No attempt was made to analyze the essential situation to determine whether or not the presumptions in favor of review contemplated by the generous review provisions of the Administrative Procedure Act were overcome.

## CONCLUSION

In view of the direct conflict between the decision of the court below and the principle in this Court's recent decisions in the cases of *City of Chicago v. United States*, 24 L.Ed.2d 340 (1969); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); and *Barlow v. Collins*, 397 U.S. 159 (1970), it appears appropriate for the Court to reverse the decision below and direct a consideration of the case on the merits below.

Respectfully submitted,

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